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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 ALTON JONES,

11 Plaintiff,

12 v.

13 U.S. BORDER PATROL AGENT
14 HERNANDEZ, et al.,

15 Defendants.
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Case No.: 16-CV-1986 W (WVG)

ORDER:

**(1) GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
COMBINED MOTION FOR
SUMMARY JUDGMENT [DOC. 98];**

**(2) GRANTING DEFENDANT
UNITED STATES’ MOTION FOR
SUMMARY JUDGMENT ON ITS
COUNTERCLAIM [DOC. 98]; AND**

**(3) GRANTING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT ON THE FOIA CAUSE
OF ACTION [DOC. 101]**

23 Pending before the Court are: (1) a combined motion for summary judgment filed
24 by all defendants [Doc. 98]; (2) a motion for summary judgment filed by Defendant
25 United States on its counterclaim [Doc. 98]; and (3) a motion for summary judgment on
26 the FOIA cause of action, filed by Defendants U.S. Department of Homeland Security
27 (“DHS”), and U.S. Customs and Border Protection (“CBP”). [Doc. 101.]
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1 The Court decides the matters on the papers submitted and without oral argument
2 pursuant to Civil Local Rule 7.1(d)(1). For the reasons that follow, the Court **GRANTS**
3 **IN PART AND DENIES IN PART** Defendants’ combined motion for summary
4 judgment, **GRANTS** Defendant United States’ motion for summary judgment on its
5 counterclaim, and **GRANTS** the motion for summary judgment on the FOIA cause of
6 action.

7
8 **I. INTRODUCTION**

9 On August 9, 2014, Alton Jones began a run onto a restricted Border Patrol
10 surveillance road adjacent to the U.S.-Mexico border fence. When federal agents
11 confronted him and attempted to remove him from the area, he ran away. They gave
12 chase and apprehended him. In the process, an agent suffered a severe ankle injury and
13 was rushed to the hospital via ambulance. Jones was detained overnight and released
14 without charge the next morning. He filed this lawsuit seeking damages from the United
15 States and the agents who took him into custody. The United States counterclaimed
16 seeking damages for the agent’s injured ankle.

17
18 **II. FACTUAL BACKGROUND**

19 Taken in the light most favorable to Jones, the facts are as follows.

20 Alton Jones is a former Navy SEAL, honorably discharged in 1990. (TAC [Doc.
21 72] ¶ 1¹; *Jones Depo.* [Doc. 52-6] 156–57.) On August 9, 2014, Jones traveled by car to
22 the Border Field State Park in San Diego California. (TAC [Doc. 72] ¶ 2.)

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26 ¹ Defendants’ motion indicates that “Defendants do not intend to dispute the *specific* allegations of
27 material *fact* in the [TAC], except the allegations that Jones was ‘pummeled’ and ‘tackled without any
28 warning’ and that there were no indicators that the All-Weather Road was restricted.” (*Defs.’ MSJ*
[Doc. 98-1] 3:27–4:2.)

1 Jones embarked on a run on a restricted surveillance road directly adjacent to the
2 border fence. This area was marked with several types of barriers and with signs
3 indicating it was off-limits, but these were visible only from the north—not from the
4 west, the direction from which Jones began his run. (*See Defs. ' Photos of Paved Road*
5 [*Doc. 98-2*]; *Jones' Photos of Dirt Path* [*Doc. 98-2*] 72–75; *Defs. ' MSJ* [*Doc. 98*] 4–5.)
6 Sensors detected Jones' presence on the road, and agents in the field were notified by
7 radio. (*RVSS Recording* [*Doc. 53*, Password: !USAO_Cv1986] 15:17:38–15:18:10.)²

8 Border Patrol Agent Johnson was the first to respond. (*RVSS Recording* [*Doc. 53*,
9 Password: !USAO_Cv1986] 15:19:00.) He drove his marked Border Patrol Chevrolet
10 Tahoe towards Jones and stopped it just beside him. (*Id.* [*Doc. 53*, Password:
11 !USAO_Cv1986] 15:19:00–15:19:15.) The video shows Johnson backing up his marked
12 SUV slowly as though trying to speak to Jones or get his attention. (*Id.*) Jones ignored
13 him. (*Id.*) He testified that he did not recall Johnson speaking to him, but that he was on
14 the phone with his wife—ostensibly through earphones—and “not paying attention” to
15 the SUV immediately adjacent to him on the narrow road. (*Jones Depo.* [*Doc. 52-6*] 63–
16 65.) Jones did notice the vehicle, however, as he testified that he yelled out, “I’m running
17 up the hill[,]” and otherwise continued running. (*Id.*; *RVSS Recording* [*Doc. 53*,
18 Password: !USAO_Cv1986] 15:19:01–15:19:20.)

19 After this brief encounter, Agent Hernandez drove up beside Agent Johnson.
20 (*RVSS Recording* [*Doc. 53*, Password: !USAO_Cv1986] 15:19:24–15:19:30.) Johnson
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22
23 ² Much of the initial pursuit was captured on video. When Jones fled, he led his pursuers behind a hill,
24 thus obscuring his arrest from the view of the camera. Jones' attorneys paint this as part of an
25 intentional plot on the part of arresting agents to lead Jones to a camera blind spot so as to abuse him.
26 (*See, e.g., Pls. ' MSJ Opp'n* [*Doc. 104*] 2.) This is not plausible. Jones chose to flee, and agents
27 followed where he led.

28 Moreover, whereas Jones represents to the Court in no uncertain terms that all involved agents knew the
area to be a blind spot of the RVSS camera system at the time of the incident, (*Pls. ' MSJ Opp'n* [*Doc.*
104] 2, 9–10), a close review of the relevant testimony shows this to be less than accurate. (*Hernandez*
Depo. [*Doc. 98-6*] 280–81; *Bowen Depo.* [*Doc. 98-7*] 237–38; *Johnson Depo.* [*Doc. 98-5*] 216.)

drove up to briefly meet him, with Johnson's SUV facing westward and Hernandez's SUV facing eastward—towards Jones. (*Id.*) The two had a brief exchange through open windows. Johnson told Hernandez that he had instructed Jones to stop, but had been ignored. (*Johnson Depo.* [Doc. 98-5] 135.) Hernandez acknowledged and said that he would go and talk to Jones. (*Id.*)

Hernandez took up pursuit, as Johnson's SUV was facing the opposite direction. (*RVSS Recording* [Doc. 53, Password: !USAO_Cv1986] 15:19:28–15:19:45.) Hernandez quickly caught up with Jones and cut him off with his vehicle so as to block Jones' continued run eastward on the surveillance road. (*Id.*) Hernandez did not initially get out of the vehicle. (*Id.*)

Jones simply ran around Agent Hernandez's SUV. In order to do so, he had to briefly run off the paved road to get around the Border Patrol vehicle that was now directly in front of him. (*Id.*) Jones testified that the SUV "pulled in front of [him]" in a "very sudden" manner, but that that he nonetheless "proceeded around[.]" (*Jones Depo.* [Doc. 52-6] 67.) Jones again testified that he was on the phone with his wife during this encounter, ostensibly through earphones. (*Id.*)

At this point, Hernandez accelerated forward and cut Jones off a second time. (*RVSS Recording* [Doc. 53, Password: !USAO_Cv1986] 15:19:40–15:20:00.) This time, Hernandez got out of his SUV and confronted Jones. (*Id.*) Hernandez told Jones to turn around. (*Hernandez Depo.* [Doc. 98-6] 192–93; *Jones Depo.* [Doc. 52-6] 78.) Jones moved from side to side as though trying to get around Hernandez, with the agent blocking Jones' path with his body. (*RVSS Recording* [Doc. 53, Password: !USAO_Cv1986] 15:19:50–15:20:10.) The agent called for backup, and Jones backed away. (*Id.* [Doc. 53, Password: !USAO_Cv1986] 15:20:00–15:20:20.)

During this encounter, Agent Johnson had turned his SUV around on the dirt path parallel to the paved road. (*RVSS Recording* [Doc. 53, Password: !USAO_Cv1986] 15:20:00–15:20:20.) He reemerged onto the paved road several seconds later, at which

1 point he pulled up alongside Jones and just behind Hernandez. (*RVSS Recording* [Doc.
2 53, Password: !USAO_Cv1986] 15:20:05–15:20:25.)

3 Johnson then got out of his vehicle. Jones slowly backpedaled for several seconds.
4 (*Id.*; *Johnson Depo.* [Doc. 98-5] 139–40.) Jones then turned and ran away in earnest
5 when Hernandez turned his SUV around to pursue him. (*RVSS Recording* [Doc. 53,
6 Password: !USAO_Cv1986] 15:20:30–15:21:00.) Jones kept running from Hernandez’s
7 SUV for at least 45 seconds, after which he exited the view of the camera. (*Id.* [Doc. 53,
8 Password: !USAO_Cv1986] 15:20:30–15:21:15.) All the while, the two Border Patrol
9 SUVs were following just behind. (*Id.*) Just as Jones led the pursuing agents out of view
10 of the surveillance camera, the pursuing Border Patrol SUV stopped, and its drivers’-side
11 door opened. The second Border Patrol SUV then passed. (*Id.* [Doc. 53, Password:
12 !USAO_Cv1986] 15:21:00–15:21:55.) A third Border Patrol SUV pulled up just behind.
13 (*Id.*)

14 Out of view of the RVSS camera system, two more agents came from ahead (the
15 west) on all-terrain vehicles: Agents Bowen and Faatoalia. (*Jones Depo.* [Doc. 52-6] 84–
16 105; *Faatoalia Depo.* [Doc. 98-8] 124; *Bowen Depo.* [Doc. 98-7] 186–209.) They tried
17 to stop Jones, but he once again tried to run around them. (*Jones Depo.* [Doc. 52-6] 100.)
18 The agents tackled Jones. (*Id.* [Doc. 52-6] 100–04, 125–28, 135, 142–45; *Bowen Depo.*
19 [Doc. 98-7] 197–205; *Faatoalia Depo.* [Doc. 98-8] 137–44.) Agent Johnson suffered a
20 severe ankle injury that required emergency hospital transport, surgery, and months of
21 light duty. (*RVSS Recording* [Doc. 53, Password: !USAO_Cv1986] 15:22:00–15:45:00;
22 *Johnson Depo.* [Doc. 98-5] 102–05.) Jones suffered abrasions consistent with a fall onto
23 a hard surface. (*Injury Photographs* [Doc. 98-2] 13–44.) Jones also experienced
24 stiffness and tenderness in his neck, stiffness and decreased range of motion in his right
25 shoulder, and stiffness and tenderness in his left wrist. (*See Wesley Progress Notes* [Doc.
26 59]; *Wesley Depo.* [Doc. 52-3] 24–31.)

27 After being handcuffed, Jones was placed in a locked Border Patrol SUV with the
28 windows up and the heater on for about twenty minutes—on a sunny August afternoon.

1 (*Jones Depo.* [Doc. 52-6] 150–51; *RVSS Recording* [Doc. 53, Password:
2 !USAO_Cv1986] 15:22:00–15:45:00.) Jones was held at the Imperial Beach Border
3 Patrol Station until the next morning. His requests for medical care were met with threats
4 of being strapped to a restraint chair with a spit bag over his head. (*See Jones Depo.*
5 [Doc. 52-6] 232–35.) He was released without charge the next morning.

6 Jones has filed the expert report of Dr. Colin Koransky, Ph.D, clinical
7 psychologist, who evaluated Jones. Dr. Koransky’s eighteen-page expert report opines
8 that being arrested by the Border Patrol “reactivated” Jones’ post-traumatic stress
9 disorder (“PTSD”). (*Koransky Expert Report* [Doc. 114] (filed under seal).)

11 **III. LEGAL STANDARD**

12 Summary judgment is appropriate under Rule 56 when the moving party
13 demonstrates the absence of a genuine issue of material fact and entitlement to judgment
14 as a matter of law. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322
15 (1986). A fact is material when, under the governing substantive law, it could affect the
16 outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
17 dispute about a material fact is genuine if “the evidence is such that a reasonable jury
18 could return a verdict for the nonmoving party.” Id.

19 A party seeking summary judgment always bears the initial burden of establishing
20 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving
21 party can satisfy this “burden of production” in two ways: (1) by presenting evidence that
22 negates an essential element of the nonmoving party’s case; or (2) by demonstrating that
23 the nonmoving party failed to make a showing sufficient to establish an element essential
24 to that party’s case on which that party will bear the burden of proof at trial. See id. at
25 322–25; Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1102–03
26 (9th Cir. 2000) (explaining relevant burden-shifting terminology). “Disputes over
27 irrelevant or unnecessary facts will not preclude a grant of summary judgment.” T.W.
28 Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

1 “[T]he district court may limit its review to the documents submitted for the
2 purpose of summary judgment and those parts of the record specifically referenced
3 therein.” Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir.
4 2001). Therefore, the Court is not obligated “to scour the record in search of a genuine
5 issue of triable fact” Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing
6 Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)).

7 If the moving party meets its initial burden of production on the motion, the
8 nonmoving party cannot defeat summary judgment merely by demonstrating “that there
9 is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v.
10 Zenith Radio Corp., 475 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co., 68
11 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson, 477 U.S. at 252) (“The mere existence
12 of a scintilla of evidence in support of the non-moving party’s position is not
13 sufficient.”). Rather, the nonmoving party must “go beyond the pleadings and by her
14 own affidavits, or by ‘the depositions, answers to interrogatories, and admissions on file,’
15 designate ‘specific facts showing that there is a genuine issue for trial.’ ” Celotex, 477
16 U.S. at 324 (quoting Fed. R. Civ. P. 56).

17 When making this determination, the court must view all inferences drawn from
18 the underlying facts in the light most favorable to the nonmoving party. See Matsushita,
19 475 U.S. at 587. “Credibility determinations, the weighing of evidence, and the drawing
20 of legitimate inferences from the facts are jury functions, not those of a judge” ruling on a
21 motion for summary judgment. Anderson, 477 U.S. at 255.

22 23 **IV. DISCUSSION**

24 **A. Qualified Immunity**

25 “The doctrine of qualified immunity shields officials from civil liability so long as
26 their conduct ‘ does not violate clearly established statutory or constitutional rights of
27 which a reasonable person would have known.’ ” Mullenix v. Luna, 136 S. Ct. 305, 308
28 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation

omitted)). “A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’ ” Id. (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012) (internal quotation omitted)). There need not be a case directly on point, but “ ‘existing precedent must have placed the statutory or constitutional question beyond debate.’ ” Id. (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) “[Q]ualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’ ” Id. (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

“The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’ ” Id. (quoting al-Kidd, 563 U.S. at 742). “This inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’ ” Id. (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)) (internal quotation omitted). “Such specificity is especially important in the Fourth Amendment context, where the [Supreme Court of the United States] has recognized that ‘[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.’ ” Id. (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

“ ‘[The Supreme Court of the United States has] repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’ ” City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015) (quoting al-Kidd, 563 U.S. at 742)). “Precedent involving similar facts can help move a case beyond the otherwise ‘hazy border between excessive and acceptable force’ and thereby provide an officer notice that a specific use of force is unlawful.” Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (quoting Mullenix, 136 S. Ct. at 309).

1. Unconstitutional Arrest and Detention

Proceeding to the second step of the qualified immunity analysis, see Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) (explaining that use of the two-step analytical

1 framework of Saucier, 533 U.S. at 200, is now discretionary per Pearson v. Callahan, 555
2 U.S. 223, 227 (2009)), neither Jones’ arrest nor detention violated clearly established
3 constitutional rights.

4 “The Fourth Amendment protects ‘[t]he right of the people to be secure in their
5 persons, houses, papers, and effects, against unreasonable searches and seizures.’ In
6 conformity with the rule at common law, a warrantless arrest by a law officer is
7 reasonable under the Fourth Amendment where there is probable cause to believe that a
8 criminal offense has been or is being committed.” Devenpeck v. Alford, 543 U.S. 146,
9 152 (2004).

10 To refuse to leave restricted federal land upon request by law enforcement is a
11 criminal offense. See Cal. Penal Code § 602(o). It is also a criminal offense to willfully
12 resist, obstruct, or delay law enforcement. See Cal. Penal Code § 148. And it is a
13 criminal offense to assault a federal officer. 18 U.S.C. § 111.

14 On this record, it is beyond genuine dispute that agents had probable cause to arrest
15 Jones for violation of all three of these statutes. Jones ignored Johnson’s initial attempts
16 to remove him from the restricted road when the agent drove up alongside—despite
17 acknowledging that he saw him. He ran around Agent Hernandez when the latter then
18 pulled his marked Border Patrol SUV directly in front to cut him off. When Hernandez
19 got out of his car to try to stop him, the RVSS video shows that Jones’ actions forced the
20 agent to call for backup. Jones then ran away for another 45 seconds. When four agents
21 finally caught up with him, Jones’ attempts to keep running resulted in a serious ankle
22 injury to an arresting agent.

23 In light of the foregoing, it cannot be said that arresting Jones and detaining him
24 overnight violated a Fourth Amendment right “ ‘sufficiently clear that every reasonable
25 official would have understood that what he is doing violate[d] that right.’ ” Mullenix,
26 136 S. Ct. at 308 (quoting Reichle, 566 U.S. at 664 (internal quotation omitted)).

27 All individual defendants are entitled to summary judgment on the first Bivens
28 claim on grounds of qualified immunity.

2. Excessive Force

Proceeding to the second step of the qualified immunity analysis, see Plumhoff, 134 S. Ct. at 2020, the force used against Jones in his arrest violated no clearly established Fourth Amendment rights.

“Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” Graham v. Connor, 490 U.S. 386, 396 (1989) (internal quotation omitted). “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Id. “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” Id. at 396–97. This is an objective inquiry. Id.

Jones initially testified that agents kicked him in the head after they had already brought him to the ground. (*Jones Depo.* [Doc. 52-6] 101.) But he later backtracked, testifying, “I think I might have been kicked, but I can’t tell you that for sure.” (*Id.* [Doc. 52-6] 143.) Agents testified that Jones was not kicked during his arrest. (*Bowen Depo.* [Doc. 98-7] 209; *Faatoalia Depo.* [Doc. 98-8] 141.)

The evidentiary record is inconsistent with the theory that the force used in Jones’ arrest violated Fourth Amendment rights of which any reasonable agent would have been aware. Mullenix, 136 S. Ct. at 308. Photographs taken after the incident show only redness and abrasions on Jones’ skin consistent with being tackled on a hard surface. (*Injury Photographs* [Doc. 98-2] 14–44.) Jones’ physician’s progress notes and deposition show that Jones did not report being kicked or punched after the incident. (*Wesley Progress Notes* [Doc. 59]; *Wesley Depo.* [Doc. 52-3] 24–31.) He showed a “stiff range of motion” in his neck, a “decreased range of motion” in his right shoulder

1 with “no tenderness[,]” and a “decreased range of motion and tenderness” in his left
2 wrist. (*Id.*) X-rays of the right shoulder and left wrist were “negative.” (*See Wesley*
3 *Progress Notes* [Doc. 59] 2; *Wesley Depo.* [Doc. 52-3] 25–26, 40.) In Facebook
4 messages to friends just afterward the incident, Jones described being “captured” or
5 “taken hostage” by “[f]ederal nothing wannabe cops[,]” telling one friend that he
6 “thought they were gona [sic] shoot me or beat me up[.]” (*Facebook Messages* [Doc. 98-
7 2] 47–70.) He did not mention being beaten or kicked. In a complaint to Senator
8 Feinstein, Jones again mentioned being captured, detained, and released without charge.
9 (*Feinstein Complaint* [Doc. 98-2] 71.) Again, he did not mention being beaten or kicked.

10 Jones ignored agents’ attempts to remove him from a restricted area. He offered
11 physical resistance, compromising the safety of agents involved—as is evident from the
12 serious and long-lasting injuries suffered by Agent Johnson. Nonetheless, faced with a
13 rapidly evolving situation and a combative suspect, the evidence leaves no room for
14 genuine dispute that agents were able to subdue Jones without causing him serious
15 physical harm. The question at this stage is not whether the force used in the arrest was
16 reasonable. It is whether, viewed without the advantage of hindsight from the
17 perspective of agents on scene rather than that of a judge’s chambers, Graham, 490 U.S.
18 at 396, any constitutional questions implicated by the force used in the arrest³ were
19 “beyond debate” such that the agents involved were “plainly incompetent” or knowingly
20 violate[d] the law.” See Mullenix, 136 S. Ct. at 308. The answer is no.

21 The motion for summary judgment as to the excessive force Bivens claim will be
22 granted on qualified immunity grounds.

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28 ³ Plaintiff argues only that the force involved with the arrest itself was constitutionally excessive. (*Pls.’ MSJ Opp’n* [Doc. 104] 26–30.)

1 **3. Unconstitutional Search**

2 Proceeding to the second step of the qualified immunity analysis, see Plumhoff,
3 134 S. Ct. at 2020, the search incident to Jones’ arrest violated no clearly established
4 Fourth Amendment rights.

5 After Agent Johnson’s ankle was injured in the act of arresting Jones, agents had
6 probable cause to believe that Jones had engaged in criminal trespass, Cal. Penal Code §
7 602(o), willfully resisting, obstructing, or delaying law enforcement, Cal. Penal Code §
8 148, and assaulting a federal officer. 18 U.S.C. § 111. As there was probable cause to
9 arrest Jones, it was lawful to search him incident to arrest. See Jones v. United States,
10 357 U.S. 493, 499 (1958).

11 All individual defendants are entitled to summary judgment on the third Bivens
12 claim on grounds of qualified immunity.

13
14 **B. FTCA**

15 “The United States shall be liable, respecting the provisions of this title relating to
16 tort claims, in the same manner and to the same extent as a private individual under like
17 circumstances, but shall not be liable for interest prior to judgment or for punitive
18 damages.” 28 U.S.C. § 2674. This section, known as the Federal Tort Claims Act
19 (“FTCA”), “provides a limited waiver of the sovereign immunity of the United States for
20 torts committed by federal employees acting within the scope of their employment.”
21 Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000).

22 Pursuant to the FTCA, Jones brings claims for False Arrest/Imprisonment, Battery,
23 Assault, Negligence, Intentional Infliction of Emotional Distress, and for violation of Cal.
24 Civ. Code § 52.1. (*TAC* [Doc. 72] ¶¶ 101–121.) The government moves for summary
25 judgment on each claim. (*Defs.’ MSJ* [Doc. 98-1] 29–39.) The court addresses each in
26 turn.

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1 **1. False Arrest/Imprisonment**

2 In California, “[f]alse imprisonment is the unlawful violation of the personal
3 liberty of another.” Cal. Penal Code § 236. “The elements of a tortious claim of false
4 imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2)
5 without lawful privilege, and (3) for an appreciable period of time, however brief.” Tekle
6 v. U.S., 511 F.3d 839, 854 (9th Cir. 2007) (quoting Easton v. Sutter Coast Hosp., 80 Cal.
7 App. 4th 485, 496 (2000)).

8 For the reasons discussed above in Part IV.A.1., *supra*, agents had probable cause
9 to arrest Jones for criminal trespass, Cal. Penal Code § 602(o), willfully resisting,
10 obstructing, or delaying law enforcement, Cal. Penal Code § 148, and assaulting a federal
11 officer. 18 U.S.C. § 111. As there was probable cause to arrest Jones, the arrest was with
12 lawful privilege and there was no false arrest. See Tekle, 511 F.3d at 854.

13 Defendants’ motion for summary judgment will be granted as to the false
14 arrest/imprisonment claim.

15
16 **2. Battery**

17 The elements of a civil battery claim in California are: “(1) defendant intentionally
18 performed an act that resulted in a harmful or offensive contact with the plaintiff’s
19 person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive
20 contact caused injury, damage, loss or harm to plaintiff.” Brown v. Ransweiler, 171 Cal.
21 App. 4th 516, 526–27 (2009). “Plaintiff must prove unreasonable force as an element of
22 the tort” of civil battery. Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1272 (1998).

23 Jones’ testimony that agents hit him during his arrest (*Jones Depo.* [Doc. 52-6]
24 141–44), together with evidence of mild injuries afterwards (*Injury Photographs* [Doc.
25 98-2] 14–45, *Wesley Progress Notes* [Doc. 59]; *Wesley Depo.* [Doc. 52-3] 24–31), leave
26 room for genuine dispute as to whether the force used to subdue Jones during the arrest
27 was reasonable. (*Jones Depo.* [Doc. 52-6] 142–44.) See Edson, 63 Cal. App. 4th at
28 1272.

1 The motion for summary judgment on the battery claim will be denied.

2
3 **3. Assault**

4 “ ‘Generally speaking, an assault is a demonstration of an unlawful intent by one
5 person to inflict immediate injury on the person of another then present.’ ” Plotnik v.
6 Meihaus, 208 Cal. App. 4th 1590, 1603–04 (2012) (quoting Lowry v. Standard Oil, 63
7 Cal. App. 2d 1, 6–7 (1944). The elements of a claim for assault in California are: (1)
8 “that defendant intended to cause harmful or offensive contact, or the imminent
9 apprehension of such contact, and (2) that plaintiff was put in imminent apprehension of
10 such contact.” Austin v. Terhune, 367 F.3d 1167, 1172 (9th Cir. 2004) (internal
11 quotation omitted).

12 The evidence discussed in Part IV.B.2, *supra*, leaves room for genuine dispute as
13 to whether agents intended to cause harmful or offensive contact during Jones’ arrest.
14 See Austin, 367 F.3d at 1172. Defendants’ motion for summary judgment on this theory
15 of assault will be denied.

16 Second, Jones contends that Agent Kulakowski’s driving him to the Imperial
17 Beach Border Patrol Station via a dirt road while wearing gloves constitutes assault.
18 (*MSJ Opp’n* [Doc. 104] 35.) It does not. He suggests through the use of the term “rough
19 ride” that he was either injured in the back of Kulakowski’s SUV, or that Kulakowski
20 intended to cause him imminent fear of harm. (*Id.*) There is no evidence of this. Merely
21 riding in a law enforcement vehicle, without more, is not assault. Defendants’ motion for
22 summary judgment will be granted as to this theory.

23 Third, Jones argues that he was assaulted when agents threatened to strap him to a
24 chair during his detention at the Border Patrol station. (*MSJ Opp’n* [Doc. 104] 36.) The
25 evidence gives rise to a genuine dispute as to whether agents intended to place Jones in
26 imminent apprehension of harm. (*Jones Depo.* [Doc. 52-6] 237.) Defendants contend
27 that any threats were conditional and lacked sufficient imminence, but this construction is
28 inconsistent with that afforded to assault by California courts. See, e.g., People v.

1 Stanfield, 32 Cal. App. 4th 1152, 1161 (1995); People v. Bolin, 18 Cal. 4th 297, 339
2 (1998), *as modified on denial of reh'g* (Aug. 12, 1998). Defendants' motion for summary
3 judgment will be denied as to this theory.

4 5 **4. Negligence**

6 "The elements of a negligence cause of action [in California] are: (1) a legal duty
7 to use due care; (2) a breach of that duty; (3) the breach was the proximate or legal cause
8 of the resulting injury; and (4) actual loss or damage resulting from the breach of the duty
9 of care." Brown v. Ransweiler, 171 Cal. App. 4th 516, 534 (2009).

10 The government argues that the FTCA negligence claim "should be dismissed for
11 the same reason that the battery claim should be dismissed, discussed above." (*Defs. '*
12 *MSJ* [Doc. 98-1] 34.) It does not elaborate further. This is not persuasive. Viewing the
13 evidence in the light most favorable to the plaintiff, there is a genuine dispute as to
14 whether agents kept Jones in a hot car for about 20 minutes with the heater on during a
15 sunny August afternoon in Southern California. (*Jones Depo.* [Doc. 104-1, Exh. A] 151;
16 *RVSS Recording* [Doc. 53, Password: !USAO_Cv1986].) There is a dispute as to
17 whether they denied requests for medical care through an overnight detention. (*Id.* [Doc.
18 104-1, Exh. A] 228–29.) And finally, there is evidence to show that when Jones
19 complained of pain in his shoulder, agents threatened him with a restraint chair. (*Id.*
20 [Doc. 104-1, Exh. A] 70, 215, 234–35, 237–39.) A reasonable jury could find negligence
21 on these facts, and injury in the form of exacerbation of Jones' preexisting post-traumatic
22 stress disorder ("PTSD").

23 Defendants' motion for summary judgment as to the FTCA negligence claim will
24 be denied.

25 26 **5. Intentional Infliction of Emotional Distress ("IIED")**

27 "The elements of a prima facie case for the tort of intentional infliction of
28 emotional distress are: (1) extreme and outrageous conduct by the defendant with the

1 intention of causing, or reckless disregard of the probability of causing, emotional
2 distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual
3 and proximate causation of the emotional distress by the defendant's outrageous conduct.
4 [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of
5 that usually tolerated in a civilized community.' ” Miller v. Fortune Commercial Corp.,
6 15 Cal. App. 5th 214, 228–29 (2017) (quoting Wilson v. Hynek, 207 Cal. App. 4th 999,
7 1009 (2012)).

8 The government argues that there is no evidence that the agents engaged in
9 extreme and outrageous conduct, or that Jones suffered extreme or severe emotional
10 distress as a result. (*Def's. ' MSJ* [Doc. 98-1] 34–35.) It is mistaken. The conduct
11 described in Part IV.B.4. as to negligence is sufficiently outrageous as to exceed all
12 bounds usually tolerated in a civilized community. See Miller, 15 Cal. App. 5th at 228–
13 29. There is evidence upon which a reasonable jury could find that law enforcement
14 officers locked Jones in a hot car in August with the heater on, refused him medical care
15 during an overnight detention, and threatened to physically restrain him when he
16 complained of pain and asked for help. (*See Part IV.B.4, Supra.*) Dr. Koransky's expert
17 report gives rise to a genuine dispute as to whether Jones suffered extreme emotional
18 distress and an aggravation of his preexisting PTSD as a result of these actions.
19 (*Koransky Expert Report* [Doc. 114] (filed under seal).)

20 Defendants' motion for summary judgment as to the FTCA IIED claim will be
21 denied.

22 23 **6. Cal. Civ. Code § 52.1**

24 The government advances two arguments as to Jones' Bane Act cause of action.

25 First, it argues that the FTCA's sovereign immunity waiver does not extend to
26 claims for violations of the Bane Act. (*Def's. ' MSJ* [Doc. 98-1] 36.) The Ninth Circuit
27 has implicitly decided that it does in a recent published opinion. Xue Lu v. Powell, 621
28 F.3d 944, 949–50 (9th Cir. 2010).

1 Second, it argues that Jones will be unable to satisfy the elements of the claim.

2 The elements of a Cal. Civ. Code § 52.1 claim are: (1) that the defendant interfered
3 with or attempted to interfere with a legal right of the plaintiff; (2) by threatening or
4 committing violent acts. Doe v. State of California, 8 Cal. App. 5th 832, 842 (2017),
5 *review denied* (June 14, 2017). “Coercion inherent in the alleged constitutional violation,
6 i.e., an overdetention in jail, is insufficient to meet the statutory requirement of ‘threat,
7 intimidation, or coercion.’ ” Id. at 842–43 (quoting Shoyoye v. Cnty. of Los Angeles,
8 203 Cal. App. 4th 947, 959 (2012)). A wrongful arrest and detention is not enough. Id.
9 at 843.

10 The government posits that Jones was threatened with a restraint chair and a spit
11 bag for his head only after he banged on his cell door—and that, as a result, these threats
12 cannot support a Bane Act claim. On the contrary, Jones testified that the threats came in
13 response to requests for medical care. (*Jones Depo.* [Doc. 52-6] 237.) The Court may
14 not infer in the government’s favor that these threats were an appropriate response to
15 Jones’ behavior. See Matsushita, 475 U.S. at 587. The motion for summary judgment
16 will be denied as to this theory.

17 However, the government is correct that Jones’ arrest and detention cannot sustain
18 a Cal. Civ. Code § 52.1 claim against it. Agents had probable cause for this arrest, and
19 there is no evidence that any coercion used to effectuate it was part of an attempt to
20 interfere with Jones’ legal rights. Jones had no right to be where he was. Nor did he
21 have a right to willfully delay or obstruct the officers trying to remove him. Jones
22 contends, “[a] reasonable factfinder could conclude that Agent Hernandez’s response—to
23 call for backup, lead Jones to a blind spot of the RVSS camera system, tackle and detain
24 him, and lie about an assault on an officer—had no reasonable purpose, and was instead
25 intended to threaten, intimidate, and coerce Jones” (*MSJ Opp’n* [Doc. 104] 38–39.)
26 Jones is incorrect. Even drawing all inferences in favor of Jones, the RVSS video leaves
27 no room for genuine dispute that agents were trying to arrest a combative individual who
28

1 ignored them and ran away in a restricted area. The motion for summary judgment will
2 be granted as to this theory.

3 4 **C. The Government's Counterclaim for Negligence**

5 The government moves for summary judgment on its negligence counterclaim on
6 the basis of the negligence per se doctrine. (*Defs. ' MSJ* [Doc. 98-1] 37–39.)

7 In California, the negligence per se doctrine is statutory:

8 (a) The failure of a person to exercise due care is presumed if:

9 (1) He violated a statute, ordinance, or regulation of a public entity;

10 (2) The violation proximately caused death or injury to person or
property;

11 (3) The death or injury resulted from an occurrence of the nature
which the statute, ordinance, or regulation was designed to prevent;
12 and

13 (4) The person suffering the death or the injury to his person or
property was one of the class of persons for whose protection the
statute, ordinance, or regulation was adopted.

14 (b) This presumption may be rebutted by proof that:

15 (1) The person violating the statute, ordinance, or regulation did what
16 might reasonably be expected of a person of ordinary prudence, acting
17 under similar circumstances, who desired to comply with the law

18 Cal. Evid. Code § 669.

19 The government contends that Jones' violation of Cal. Penal Code § 148(a)(1) by
20 resisting the efforts of the agents to remove him from the road is negligence per se, and
21 that Jones lacks evidence to rebut the presumption. (*Defs. ' MSJ* [Doc. 98-1] 37–39.) The
22 government is correct.

23 Every person who willfully resists, delays, or obstructs any public officer,
24 peace officer, or an emergency medical technician, as defined in Division
2.5 (commencing with Section 1797) of the Health and Safety Code, in the
25 discharge or attempt to discharge any duty of his or her office or
26 employment, when no other punishment is prescribed, shall be punished by a
27 fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a
28 county jail not to exceed one year, or by both that fine and imprisonment.

1 Cal. Penal Code § 148(a)(1). Even crediting Jones' testimony that Agent Hernandez told
2 him to turn around after he had run around him once, Jones was soon chased by two
3 agents from behind and confronted by two other agents from the west, on all-terrain
4 vehicles. Rather than stopping, he chose to try to escape:

5 Q: So okay. So two more ATVs, you say, tried -- or blocked your path
6 and you went around them?

7 A: Yes, sir.

8 Q: Okay.

9 A: No, I didn't go around them. I was -- I was going around them as I
10 had previously done heading back to where I came from. And as soon as I
11 tried to go around them, they jumped on me, and they took me down to the
12 ground. And then they got me down on the ground, and I'm going, "why are
13 you guys doing? I ain't done nothing. Why are you doing this?"

14 (*Jones Depo.* [Doc. 52-6] 100–01.)

15 Jones testified that he knew the agents on the ATVs were law enforcement
16 officers, that they pulled up on the road in front of him to block his path, and that he still
17 tried to run around them. (*Jones Depo.* [Doc. 52-6] 104–05 (“[T]hey pulled up on the
18 road in front of me . . . they’re blocking me, and it was like I was being captured
19 [A]s soon as I went past him he jumped on me. I didn’t slow down I just went --
20 tried to go around them”) By continuing to run when confronted by two agents
21 blocking his path, Jones willfully resisted. Cal. Penal Code § 148(a)(1). This injured
22 Agent Johnson, an occurrence of the type the statute was passed to prevent suffered by
23 someone in the class of people for whose protection the statute was adopted. See Cal.
24 Evid. Code § 669; In re M.M., 54 Cal. 4th 530, 533 (2012). There is no evidence that
25 Jones did what might reasonably be expected of a person of ordinary prudence who
26
27
28

1 wanted to comply with the law when confronted by two federal agents with another two
2 pursuing just behind—stop running.⁴ See Cal. Evid. Code § 669(b).

3 The government’s motion for summary judgment on its negligence counterclaim
4 will be granted.

5
6 **D. Freedom of Information Act (“FOIA”)**

7 FOIA, 5 U.S.C. § 552 et seq., was enacted “to promote honest and open
8 government” and “to ensure public access to information created by the government . . .
9 .” Wood v. FBI, 432 F.3d 78, 82 (2d Cir. 2005) (internal quotations omitted). Because
10 FOIA favors a policy of disclosure, the statutory exemptions are construed narrowly,
11 resolving all doubts in favor of disclosure. See Lion Raisins v. U.S. Dept. of Agriculture,
12 354 F.3d 1072, 1079 (9th Cir. 2004), *overruled on other grounds by* Animal Legal
13 Defense Fund v. U.S. Food & Drug Administration, 836 F.3d 987 (9th Cir. 2016).

14 “Where the Government withholds documents pursuant to one of the enumerated
15 exemptions of FOIA, ‘the burden is on the agency to sustain its action.’ ” Lion Raisins,
16 354 F.3d at 1079 (quoting 5 U.S.C. § 552(a)(4)(B)). The government may rely on
17 affidavits to establish that an exemption applies. Lewis v. Internal Revenue Serv., 823
18 F.2d 375, 378 (9th Cir. 1987). The affidavits, however, must demonstrate that the
19 affiants are knowledgeable about the information sought and must include sufficient
20 detail about the documents to allow the court to make an independent assessment of the
21 government’s claim. Lion Raisins, 354 F.3d at 1080 (relying on affidavit that included
22

23
24 ⁴ Agent Bowen testified at deposition that Jones did briefly stop resisting, moving his hands together so
25 that he could be handcuffed. (*Bowen Depo.* [Doc. 98-7] 188–92.) However, according to Bowen, only
26 seconds later Jones then violently lunged towards Agent Johnson, injuring him. (*Id.* [Doc. 98-7] 196–
27 202.)

28 Even pursuant to this version of the facts, Jones’ momentary cooperation is not enough to bring his
behavior outside the purview of California’s statutory negligence per se doctrine. “A person of ordinary
prudence, acting under similar circumstances, who desired to comply with the law” would not have
offered this sort of violent resistance. See Cal. Evid. Code § 669(b)(1).

1 “detailed and specific descriptions of each category of information included” on the
2 document.).

3 Furthermore, FOIA requires that even if some materials from the requested record
4 are exempt from disclosure, “any reasonably segregable information from those
5 documents must be disclosed after redaction of the exempt information unless the
6 [non-]exempt portions are inextricably intertwined with exempt portions.” Johnson v.
7 Exec. Office for United States Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal
8 quotations omitted).

9 In deciding a motion for summary judgment in a FOIA matter, the Court may rely
10 solely on affidavits submitted by the government describing the documents sought. Lion
11 Raisins., 354 F.3d at 1082. “Ordinarily, the government must submit detailed public
12 affidavits identifying the documents withheld, the FOIA exemptions claimed, and a
13 particularized explanation of why each document falls within the claimed exemption
14 [t]his submission is commonly referred to as a ‘Vaughn’ index.” Id. (citing Vaughn v.
15 Rosen, 484 F.2d 820, 823–25 (D.C. Cir. 1973)). In order to rule solely based on
16 government affidavits, the declarants must be “knowledgeable about the information
17 sought[,] and the affidavits [must be] detailed enough to allow the court to make an
18 independent assessment of the government’s claim” *de novo*. See id. at 1079.

19 The government’s amended Vaughn index and accompanying exhibits leave no
20 room for genuine dispute that it has conducted a search reasonably calculated to uncover
21 all relevant documents, and that it has released all reasonably segregable non-exempt
22 information in response to the FOIA request. (*Amended Vaughn Index* [Doc. 120-4, Exh.
23 31]; *Exhibits 32–63* [Docs. 120-5–120-36].) See Lion Raisins, 354 F.3d at 1082;
24 Johnson, 310 F.3d at 776.

25 The motion for summary judgment on the FOIA cause of action will be
26 granted.

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28 //

1 **V. CONCLUSION & ORDER**

2 Defendants' combined motion for summary judgment is **GRANTED IN PART**
3 **AND DENIED IN PART.** [Doc. 98.]

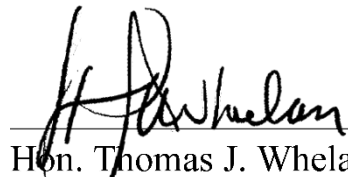
4 Specifically, it is denied as to the FTCA battery claim, the FTCA assault claim as
5 to the theories that agents assaulted Jones by using force during his arrest and by
6 threatening Jones at the Imperial Beach Border Patrol station, the FTCA negligence
7 claim, the FTCA IIED claim, and the FTCA Bane Act claim as to threats delivered while
8 Jones was in custody at the Imperial Beach Border Patrol Station. The motion is
9 otherwise granted.

10 The government's motion for summary judgment on its negligence counterclaim is
11 **GRANTED.** [Doc. 98.]

12 The government's motion for summary judgment on Jones' FOIA cause of action
13 is **GRANTED.** [Doc. 101.]

14
15 **IT IS SO ORDERED.**

16 Dated: November 15, 2018

17
18 
19 Hon. Thomas J. Whelan
United States District Judge